Southwestern Bell Telephone

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 6, 1993

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Richard C. Hartgrove
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92-222

Dear Bill:

Re: SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION TO STRIKE AND, ALTERNATIVELY, OPPOSITION TO EMERGENCY PETITION TO HOLD PROCEEDINGS IN ABEYANCE

Enclosed please find an original and four (4) copies of the above-referenced pleading to be filed with the Secretary of the Commission on Wednesday, April 7, 1993. Also enclosed is a copy of the pleading to be filed-stamped and returned to me.

Additional copies of the pleading are attached to be used as the courtesy copies and one is included for your files.

Please call to confirm that the pleading has been filed. Thank you for your assistance.

Very truly yours,

Richard C. Hartgrove

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Expanded Interconnection with Local Telephone Company Facilities	)	CC Docket No. 91-141
	)	
Amendment of the Part 69 Allocation of General Support Facilities Costs	)	CC Docket No. 92-222

TO: THE COMMISSION

SOUTHWESTERN BELL TELEPHONE COMPANY'S
MOTION TO STRIKE AND, ALTERNATIVELY, OPPOSITION TO
EMERGENCY PETITION TO HOLD PROCEEDINGS IN ABEYANCE

supplement other, authorized pleadings that it has or still can file in established Commission pleading cycles. Alternatively, if the Commission decides to accept the Emergency Petition it should be summarily rejected on the merits.

II. MFS' EMERGENCY PETITION IS PROCEDURALLY IMPROPER AND PREJUDICIAL TO OTHER PARTIES AND SHOULD BE STRICKEN.

All interested parties have already had a full opportunity to file comments and reply comments regarding any aspects of the Commission's proposal in CC Docket No. 92-222 to reallocate GSF costs. Nothing in MFS' Emergency Petition justifies, or even purports to explain, why MFS could not have raised all of its points related to the GSF reallocation during the pleading cycle that the Commission established expressly for that purpose.[1]

Likewise, all interested parties will have a full opportunity to file comments and reply comments regarding any aspects of the LECs' proposed ZDP plans in CC Docket No. 91-141. In fact, comments were due in that docket on March 26, 1993--three days after MFS filed its unauthorized, separate Emergency Petition. MFS offers no explanation as to why it could not have made all of its points regarding the ZDP plans within its comments in that proceeding, as the Commission intended. Teleport Communications Group, Inc., another Competitive Access Provider (CAP) like MFS, did precisely that in its comments in that proceeding (p. 1).

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[1] Comments in that proceeding were filed on December 8, 1992, and reply comments were filed on December 21, 1992.

Moreover, MFS still has the opportunity to file reply comments in that proceeding, which are not due until April 16, 1993.[2]

Parties should not be permitted to supplement their positions by filing unauthorized pleadings in proceedings where they have been given every opportunity to make the same points within pleadings that the Commission has expressly authorized in established pleading cycles. Such a practice makes a mockery of codified administrative procedures and serves only to confuse the issue of when pleadings are due at the Commission and on what subjects.

Furthermore, this practice is prejudicial to other interested parties who strive to make all of their points within the pleadings authorized and timelines established by this Commission. No party should be allowed to effectively dictate what issues commentors will address, and when they will be addressed, within ongoing Commission proceedings by making stand-alone filings whenever that suits a party's own self interests.

MFS' Emergency Petition should be stricken and returned to MFS. In the event that the Commission decides to accept MFS' unauthorized and improper pleading, SWBT would strongly oppose it for the following reasons.

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[2] See Order, DA 93-351, released March 26, 1993, para. 3.

III. MFS' EMERGENCY PETITION IS WHOLLY UNJUSTIFIED ON THE MERITS AND REPRESENTS AN ANTICOMPETITIVE PLAN THAT SHOULD BE STOPPED IN ITS TRACKS.

Ironically, while expressing purported concerns over a purely hypothetical potential for LEC anticompetitive conduct, MFS itself openly admits that the goal of its Emergency Petition is to prevent LECs from lowering their prices in competition with MFS' prices. Otherwise, MFS claims, it will face "imminent and irreparable competitive harm."[3] The Commission should see this MFS ploy for what it really is: a last-ditch attempt to prevent LECs from obtaining any additional ability to present MFS with true price competition in the marketplace.[4]

A. The Impending Commission Actions That MFS Seeks To Halt Will Not Result In Below-Cost LEC Offerings.

The foundation of the MFS Emergency Petition appears to be the argument that, if the Bureau approves the LECs' ZDP plans and effects the GSF reallocation, the cumulative effect (combined with existing LEC capabilities to lower special access prices in the near term) would be that LECs then could lower their prices well below costs and still be acting completely within the

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[3] MFS Emergency Petition, p. 1.

[4] MFS seeks to restrict LEC volume and term discounts while at the same time itself offering huge discounts through the use of rate ranges. MFS' and Teleport's rate ranges give them unlimited volume and term discounts. MFS' tariff offers no rate floor, while Teleport's tariff offers rate ranges with discounts larger than any LEC offering. For example, Teleport's discount for DS3 Local Distribution channels is as much as 85% (Teleport tariff page 44). In addition, Teleport's tariff also allows it to offer additional discounts whenever it wishes (Teleport tariff page 37). Under the terms of their filed tariffs, MFS and Teleport could offer services for free, if they found it strategically advantageous to do so.

Commission's rules. If so, all of MFS' arguments must fall because their foundation is fatally infirm.

Although the Commission's Price Cap rules afford LECs the ability to lower their prices within specified ranges, and although approved ZDP plans will increase LEC flexibility somewhat in that regard, the simple fact of the matter is that nowhere do the Commission rules permit LECs to price any of their services below cost. In fact, in the Price Cap Proceeding the Commission expressly provided that, no matter what pricing flexibility was being given to LECs under price caps, under no circumstances were LECs being given the right to price below cost.

Furthermore, even if that were not the case, MFS' argument would be baseless because of another point that was stressed in the Commission's Price Cap Proceeding. MFS complains that as long as a LEC's price reductions do not fall below the lower price cap band, those prices could be predatory and MFS would have no recourse other than a Section 208 complaint "and its ensuing delay."[5]

However, in the LEC Price Cap Order, the Commission emphasized that, even in the case of LEC within-band filings, where warranted, it would "require carriers to come forward with additional rate information," adding that "[p]ersuasive evidence of . . . precipitous decreases having anticompetitive effect [could

[5] MFS Emergency Petition, pp. 8-9.

convince the Commission] that the carrier need[s] to supplement its original rate filing."[6]

In any event, as the Commission itself noted throughout the Price Cap Proceeding, it is most unlikely that any LEC would even attempt to price its services predatorily. This is especially true regarding LEC competition with MFS and the other CAPs.

Since CAPs have already entered the market, a predatory pricing campaign would have to be aimed at driving them out of business. However, it would not be sufficient for CAPs to exit the market since the transmission capacity they installed would remain. If LECs attempted to establish special access prices at monopoly levels to recoup the financial losses incurred during the period of below-cost pricing (even though upper banding limits virtually eliminate this possibility), either CAPs would re-enter the market or Interexchange Carriers (IXCs) would be eager to acquire CAPs' transport facilities. The prospect of IXCs' providing their own access transport service shows that a LEC attempt at predatory pricing would fail. Any LEC initiating a predatory pricing strategy would incur large financial losses because of setting prices below its own incremental cost and then being unable to establish itself as a monopoly in a market into which IXCs could easily vertically integrate their operations.

Hence, denying LECs the use of zone density pricing and volume and term discounts in their special access tariffs because

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[6] Second Report and Order, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), para. 294 and n. 379, respectively.

of predatory pricing fears would be completely without justification. Indeed, under price caps the LECs have had the ability for some time now to lower their special access prices below their current levels, yet they have not done so. This fact alone serves to undercut substantially MFS' professed fears that LECs will price unlawfully unless its Emergency Petition is granted.

Furthermore, MFS' claims suffer from severe factual flaws. For example, MFS states that "the Commission has no basis for determining that current LEC volume and term discount rates are just and reasonable."[7] This statement is simply wrong. All LEC volume and term discounts were established under full Commission scrutiny. Many were implemented under rate of return regulation, and all had full Section 61.38 cost support. Moreover, MFS presumes that LECs could lower categories by 10 percent. However, the Commission's 5 percent lower banding limit on the overall reduction in the digital category would probably be violated if LECs did so. Thus, another of MFS' underlying presumptions is tenuous, at best.

The facts and evidence show that it is extremely unlikely that any LEC special access prices are set predatorily low. They also show that Bureau approval of LEC ZDP plans would be extremely unlikely to result in predatory LEC prices. Finally, even if LECs were able to lower prices below cost and still stay within applicable price cap bands, the Commission has noted that it could

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[7] MFS Emergency Petition, p. 2.

and would step in to ensure against any possible antidiscriminatory effects.

B. GSF Cost Reallocation Is Irrelevant To MFS' Position.

The LEC issue of GSF cost reallocation is irrelevant to the LEC predatory pricing concerns raised by MFS. The GSF category represents only overhead costs. The incremental cost of providing special access service is unaffected by changes in how overhead costs are recovered. Since prevailing LEC rates are recovering both the incremental cost of providing the service and a portion of overhead costs, reducing the amount of LEC overhead costs recovered through sales of special access service will not mean that LEC prices will fall below incremental costs. Nevertheless, MFS reaches the curious conclusion that LEC price changes resulting from changing the GSF cost allocation method must be "cost justified."[8]

MFS' arguments would only merit consideration if MFS were correct in asserting that current LEC prices are predatorily low [illegible]

Since MFS is asserting that it cannot compete even with current LEC prices, as a practical matter it is forced to also argue that these LEC prices are predatorily low. If MFS asserted that it could not compete with current LEC prices, but admitted that LEC prices are set at or slightly above LEC incremental cost, MFS would effectively be conceding that it has a higher cost structure than LECs and that it cannot compete even with LEC prices set at or above LEC incremental cost. Since MFS would never want to make such a concession, it is compelled to argue, as it does here, that current LEC prices must be predatorily low.

Therefore, MFS' arguments about GSF reallocation are irrelevant and unfounded, and should be rejected by the Commission.

IV. CONCLUSION

The Commission must remain aware that the basis of MFS' unsubstantiated predatory pricing allegations could well be a desire to maximize corporate profits rather than a genuine concern about the public welfare. While MFS has requested that the Commission delay LEC zone density pricing, no postponement of special access collocation was mentioned. Thus, MFS is asking the Commission to allow it to take advantage of collocation opportunities while simultaneously withdrawing the limited pricing flexibility that the Commission has been willing to extend to LECs. Furthermore, MFS argues that the Commission should require LECs to raise existing special access rates. If MFS achieves its goals of physical collocation and LEC special access prices basically frozen at levels higher than current tariff rates, it will have convinced the Commission to impose significant competitive disadvantages upon LECs and will harm access customers. To guarantee that the benefits of competition accrue to telecommunications consumers, the Commission should encourage competitive market conditions, not

CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing Motion to Strike and, Alternatively, Opposition to Emergency Petition to Hold Proceedings in Abeyance of Southwestern Bell Telephone Company in CC Docket 91-141, have been served this 7th day of April, 1993 to the Parties of Record.

Liz Jensen

Liz Jensen

April 7, 1993

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